



Kenya Shoes & Leather Workers Union v Modern Soap Factory (Cause 615 of 2014) [2023] KEELRC 48 (KLR) (19 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 48 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 615 OF 2014
AK NZEI, J
JANUARY 19, 2023**

**BETWEEN
KENYA SHOES & LEATHER WORKERS UNION CLAIMANT
AND
MODERN SOAP FACTORY RESPONDENT**

JUDGMENT

1. Vide a memorandum of claim dated December 4, 2014 and filed in this court on December 5, 2014, the claimant sued the respondent and pleaded:-
 - a. that the 1st grievant, Stephen Kimilu, was employed by the respondent as a machine operator in the year 2012, and served in the same capacity until May 2014 when his service was terminated by the respondent on allegations that the 1st grievant had been sleeping at his place of work (while) on a night shift.
 - b. that at the time of dismissal, the 1st grievant was earning ksh. 11,085 per month, inclusive of house allowance.
 - c. that the first grievant was unfairly dismissed as the respondent did not comply with section 41 of the *Employment Act* before effecting the dismissal, and the 1st grievant was not given an opportunity to state his case and to put up his defence before being dismissed.
 - d. that the respondent did not prove the reason or reasons for terminating the 1st grievant's employment in accordance with sections 43(1) and 45 of the *Employment Act* 2007.
2. The claimant prayed for the 1st grievant's reinstatement or re-engagement pursuant to section 49(3) of the *Employment Act*, or in the alternative, payment of ksh. 161,997 made up of kshs. 11,085 being one month salary in lieu of notice, ksh. 17,892 be leave payment for two years, ksh. 133, 020 being twelve months' salary in compensation for unfair termination and issuance of a certificate of service.



3. The claimant further pleaded:-
 - a. that the 2nd grievant, Chritsala Baya Mahendakazi, was employed by the respondent in the year 2006 as a Machine Operator, and continued serving in the same capacity until May 2014 when his service was terminated by the respondent on allegation that the 2nd grievant had been sleeping at his place of work during a night shift.
 - b. that the 2nd grievant was earning ksh. 11,085 per month at the time of termination, inclusive of house allowance.
 - c. that the 1st grievant was unfairly terminated as the respondent did not comply with section 41 of the Employment Act before effecting the dismissal, and that the 2nd grievant was not given an opportunity to state his case and to put up his defence before being dismissed.
 - d. that the respondent did not prove the reason for the dismissal, which the claimant termed as malicious and bad in law.
4. Just as in the 1st grievant's case, the claimant prayed that the 2nd grievant be reinstated or be re-engaged pursuant to section 49(3) of the Employment Act, or in the alternative be paid a total of ksh. 161,997 made up of ksh. 11,085 being one month salary in lieu of notice, ksh. 17,892 being leave payment for two years, ksh. 133,020 being twelve months' salary in compensation for unfair termination and issuance of a certificate of service.
5. Documents filed alongside the memorandum of claim included copies of correspondence on a conciliation process undertaken prior to institution of the suit herein pursuant to provisions of the Labour Relations Act, but which did not bear any fruit, leading to invocation by the claimant of section 73(1) of the said Act; NHIF Members Summary and an NSSF statement for the 1st and the 2nd grievants respectively. The grievants' written witness statements were subsequently filed on 7th May 2015.
6. The respondent filed a memorandum of reply on February 10, 2015, dated February 5, 2015, and pleaded:-
 - a. that the claimant lacked locus standi to bring the suit herein as there existed no recognition agreement between the claimant and the respondent.
 - b. that the 1st grievant, Stephen Kimilu Kitema, was employed by the respondent in 2012 as pleaded by him, but he was employed as a casual employee who was engaged from time to time on a daily basis as and when the respondent's work required him to be so engaged.
 - c. that the 1st grievant worked intermittently and on a daily basis between the period 2012 and 2014 as and when the respondent's workload required him to so do, and was not or could not be terminated in 2014 as he was never, at any given time, in the respondent's permanent employment.
 - d. that after the 1st grievant's last day of engagement with the respondent on January 19, 2014, he (the 1st grievant) did not report to work at all and instead lodged a complaint alleging wrongful dismissal from employment.
 - e. that the 1st grievant is not entitled to the reliefs sought.
7. Regarding the 2nd grievant, the respondent: -
 - a. denied having employed the 2nd grievant in 2006, and pleaded that the 2nd grievant, Christala Baya Mahendakazi, was employed by the respondent as a casual in 2011, and was engaged



intermittently from time to time on a daily basis as and when the respondent's work required him to be so engaged.

- b. that the 2nd grievant worked for the respondent intermittently and on daily basis between 2011 and 2014 as and when the respondent's workload required him so to do, but could not be terminated in 2014 as alleged in the memorandum of claim or at all as he was never, at any given time, a permanent employee.
 - c. that after the 2nd grievant's last day of engagement with the respondent on January 18, 2014, he (the 2nd grievant) did not report to work at all, and instead lodged a claim alleging wrongful dismissal from employment.
 - d. that the 2nd grievant is not entitled to the reliefs claimed.
8. On June 25, 2015, the respondent filed a written witness statement by one Poojan Kanabar, a director of the respondent company. The respondent also filed a bundle of handwritten record titled "job attendance summary."
 9. On December 19, 2017, the respondent filed a notice of preliminary objection on points of law dated November 17, 2017, stating that the claimant had no locus standi to institute the suit herein, and calling for the suit to be struck out with costs. The preliminary objection was considered by this court (Ndolo J), and was overruled vide a ruling delivered on July 31, 2018.
 10. When trial opened on September 28, 2021, the 1st grievant testified and adopted his filed witness statement as his testimony. He told the court that he was employed by the respondent in 2012 as a Machine Operator and worked for two years and was terminated on allegation that he had been sleeping during the night, yet he had been working. That he was not subjected to any disciplinary proceedings, and he never received any letter. The 1st grievant further testified that he was only called by his employer, accused of sleeping and then chased away. That he had worked in night shift the day he was terminated.
 11. Cross-examined, the 1st grievant testified that he was being paid after every two weeks, and was signing upon being paid, and that the days that he worked were more than those indicated on the documents filed by the respondent. That for example, he worked through out the month of February in 2013 but the documents filed by the respondent indicated that he only worked for ten days. He told the court that he did not agree with the record/documents filed by the respondent.
 12. The 2nd grievant testified and adopted his filed witness statement as his testimony. Cross-examined, the 2nd grievant told the court that he was being paid after every two weeks, that he worked continuously on daily basis and was not employed on need basis. That the 1st grievant was his fellow Machine Operator and that the two were terminated on the same date on allegation of having been sleeping, though they worked on different shifts. It was the 2nd grievant's further testimony that he was called to the office and told to go home as his employment had been terminated.
 13. The respondent called one witness, Poojan Kanabar (RW-1) who adopted his filed witness statement as his testimony. He produced in evidence the handwritten documents which he categorized as follows:-
 - a. from page 5 to page 19, job attendance summary for the period June 2011 to January 2014.
 - b. from page 20 to page 158, daily payment register for the period June 2011 to January 2014.
 14. The respondent's witness (RW-1) further testified:-



- a. that the respondent had a few permanent employees and the rest were casuals, taken on day to day basis when there was work; and that the claimants were casuals in the respondent's company.
 - b. that the claimants were being paid ksh. 1,001 for night shift and ksh. 525 for day shift, and were paid for the last day that they worked.
 - c. that the respondent did not terminate the grievants, but they failed to show up for work.
 - d. that the grievants were being paid each day or the following day if they left before the money came.
15. Cross-examined, RW-1 testified that the list of employees produced by the respondent did not contain the employees' ID numbers, and that all the casuals were Machine Operators and they used to come and work on daily basis.
16. Upon considering the pleadings filed and evidence adduced by both parties, issues that present for determination, in my view, are as follows:-
- a. whether the grievants were employed as casuals by the respondent.
 - b. whether the grievants' employment was terminated by the respondent, and if so, whether the termination was unfair.
 - c. whether the grievants are entitled to the reliefs sought.
17. On the first issue, the respondent pleaded that it employed the 1st and the 2nd grievants as casuals during the period 2012 to 2014 and 2011 to 2014, respectively. The grievants pleaded and testified that they worked continuously as Machine Operators during their respective periods of employment, while the Respondent pleaded and testified that the grievants were, during the said periods, taken by the respondent to work as casuals on need basis. Cross-examined, however, the respondent's witness (RW-1) testified that all its casuals were Machine Operators, and that they worked on daily basis. It is to be noted that the grievants pleaded and testified that they were employed as Machine Operators.
18. Section 37(1) of the *Employment Act* provides as follows:-
- (1) notwithstanding any provisions of this Act, where a casual employee:-
 - a. Works for a period or a number of continuous working days which amount in aggregate to the equivalent of not less than one month, or
 - b. Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where, wages are paid monthly, and section 35(1) (c) shall apply to that contract of service."
19. Section 37(3) of the *Employment Act* provides as follows:-
- "an employee whose contract of service has been converted in accordance with sub section (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee."
20. I find and hold that although the grievants may have been initially employed by the respondent as casual employees, their respective contracts of service were, by dint of the foregoing provisions of the



law, converted to term contracts where wages were payable monthly, and whereon section 35(1) (c) of the Employment Act applied. The grievants became entitled to such terms and conditions of service as they would have been entitled to under the Employment Act had they not initially been employed as casual employees.

21. On the second issue, the grievants testified that they were, in May 2014, dismissed from employment by the Respondent on allegation that they had been sleeping at work during a night shift, that they were not subjected to any disciplinary proceedings and were not given an opportunity to be heard before being terminated. On its part, the Respondent testified that the grievants were not, and could not be terminated as stated by them as they were not, and had never been permanent employees of the Respondent. The Respondent denied having terminated the grievant's employment and stated that the grievants just failed to turn up for work.
22. Having already made a finding that the provisions of the Employment Act applied to the grievants' contracts of service as would be the case had they not initially been employed as casuals, the question that arises is what disciplinary action the Respondent took against the grievants if at all they absented themselves from the place appointed for the performance of their work.
23. The respondent (RW-1) did not demonstrate that the Respondent took any disciplinary action against the grievants, although an employee who without leave or lawful cause absents himself from the place appointed for performance of his work commits gross misconduct (Section 44(4) (a) of the Employment Act). I accept the grievants evidence that their employment was terminated by the Respondent. On whether this termination was unfair, the Claimant pleaded, and the grievants testified that the Respondent did not comply with Section 41 of the Employment Act before terminating the grievant's employment, did not give the grievants an opportunity to be heard before termination, and did not prove the alleged reasons for termination.
24. Section 41 of the Employment Act sets out mandatory procedural requirements that must be adhered to by any employer contemplating termination of an employee's employment. The section provides as follows:-
 - (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make."
25. The Respondent did not comply with the foregoing mandatory provisions of the statute, and did not even allege to have done so. All that the Respondent (RW-1) told the Court was that the grievants were casuals and were not, and could not have been terminated as alleged by them as they were not permanent employees. I find and hold that termination of the grievants' employment was unfair. The Court of appeal held as follows in the case of Kenfright [e.a] Limited -vs- Benson K. Nguri[2016] eKLR:-

“apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another



employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken....We come to the conclusion and find, in agreement with the trial Judge, that the termination of the Respondent's contract of service in the circumstances, was unfair, the payment in lieu of notice notwithstanding..."

26. Further, the respondent did not prove any reason on the basis of which the grievants' employment was terminated. Section 43(1) of the Employment Act provides as follows:-

"In any claim arising out of termination of a contract, the employer shall be required to prove the reason or the reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45."

27. It was held as follows in the case of Walter Ogal Anuro -vs- Teachers Service Commission [2013] eKLR:-

"...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination."

28. I find and hold that termination of the grievants' employment was procedurally and substantively unfair.

29. On the third issue, the Claimant pleaded that each of the grievants was earning ksh. 11,085 at the time of termination. The Respondent (RW-1) testified that the grievants earned ksh. 515 for day time shift and ksh. 1,001 for night shift. Parties are, however, bound by their pleadings, and any award that this Court will make in favour of the grievants will be calculated based on salaries pleaded by the claimant.

30. On the claim for compensation for unfair termination of employment, I award each of the grievants the equivalent of eight months' salary being compensation for unfair termination of employment. The claims for ksh. 17,892 by each grievant being two years leave pay were not proved, and are declined. The claim for one month salary for each grievant in lieu of notice is allowed. The claim for issuance of certificates of service is allowed.

31. Ultimately, and having considered written submissions filed on behalf of both parties, judgment is hereby entered in favour of the Claimant against the Respondent as follows:-

- a. 1st grievant – Stephen Kimilu Kitema
 - i. Equivalent of eight months' salary being compensation for unfair termination of employment (ksh. 11,085X8) =Ksh. 88,680.
 - ii. One month salary in lieu of noticeksh. 11,085
Total Ksh. 99,765
- b. 2nd grievant (Chitsala Baya Mahendakazi)
 - i. Equivalent of eight months' salary being compensation for unfair termination of employment.....ksh. 88,680
 - ii. One month salary in lieu of notice.....ksh. 11,085
Total Ksh. 99,765



32. The respondent shall issue certificates of service to the 1st and 2nd grievants pursuant to section 51(1) of the [Employment Act](#) within thirty days from the date of this judgment.
33. The claimant is awarded costs of the suit and interest at court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF JANUARY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Maina for Claimant

Miss Mutune Respondent

